FILE COPY

Office-Supreme Court, U.S.
FILED
DEC 23 1959
JAMES R. BROWNING, Clerk

No. 551

In the Supreme Court of the United States

OCTOBER TERM, 1959

GLADYS LAYCOCK, PETITIONER

v.

FRANK J. KENNEY

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
SAMUEL D. SLADE,
RONALD A. JACKS,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

Pa

Opinions below
Jurisdiction
Questions presented
Statutes involved
Statement
Argument
Conclusion

CITATIONS

Cases:

Blackmer v. *Guerre*, 342 U.S. 512
Block v. *Hirsh*, 256 U.S. 135
British-American Tobacco Co. v. *Federal Reserve Bank*, 104 F. 2d 652
Emery Bird Thayer Dry Goods Co. v. *Williams*, 107 F. 2d 965
Gnerich v. *Rutter*, 265 U.S. 388
Laycock v. *Mathes*, 354 U.S. 919
Laycock v. *United States*, 230 F. 2d 848, certiorari denied, 351 U.S. 964
Ling Su Fan v. *United States*, 218 U.S. 302
Mugler v. *Kansas*, 123 U.S. 623
Norman v. *B. & O. R. Co.*, 294 U.S. 240
Nortz v. *United States*, 294 U.S. 317
Omnia Commercial Co. v. *United States*, 261 U.S. 502
Pennsylvania Coal Co. v. *Mahon*, 260 U.S. 393
United States v. *Causby*, 328 U.S. 256
United States v. *Central Eureka Mining Co.*, 357 U.S. 155
United States v. *Dickinson*, 331 U.S. 745
United States v. *General Motors Corp.*, 323 U.S. 373
United States v. *Kansas City Life Ins. Co.*, 339 U.S. 799
United States v. *Pewee Coal Co.*, 341 U.S. 114
United States ex rel. T.V.A. v. *Powelson*, 319 U.S. 266
Warner Valley Stock Co. v. *Smith*, 165 U.S. 28
Webster v. *Fall*, 266 U.S. 507

Constitution, statutes and regulations: Page

United States Constitution, Art. I, Sec. 8, Cl. 5 2

United States Constitution, Fifth Amendment 4

Gold Reserve Act of 1934, 48 Stat. 337, as amended, 31 U.S.C. 440, *et seq.*:

Sec. 3 ..... 2, 4, 5

Sec. 9 3

Sec. 8 3

R.S. 3699 3

R.S. 3700 3

31 U.S.C. 773b 5

Treasury Department Gold Regulations:

31 C.F.R. 54.1–54.70 6

31 C.F.R. 54.12 6

31 C.F.R. 54.44 6

31 C.F.R. 54.52 6

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 551

GLADYS LAYCOCK, PETITIONER

v.

FRANK J. KENNEY

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 17–40) is reported at 270 F. 2d 580. The memorandum opinion of the district court is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1959 (Pet. 40). A timely petition for rehearing was denied on October 21, 1959 (Pet. 41). The petition for a writ of certiorari was filed on November 28, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Gold Reserve Act of 1934 is within the authority of Congress to regulate the value of money under Art. I, Sec. 8, Cl. 5 of the United States Constitution.

2. Whether the regulations which the respondent seeks to enforce are reasonably related to the Secretary of the Treasury's statutory power to control the acquisition and processing of gold.

3. Whether the Gold Reserve Act of 1934 or the Treasury regulations thereunder constitute a "taking" of the petitioner's property under the Fifth Amendment to the United States Constitution.

STATUTES INVOLVED

1. Section 3 of the Gold Reserve Act of 1934, 48 Stat. 340, as amended, 31 U.S.C. 442, provides:

> The Secretary of the Treasury shall, by regulations issued hereunder, with the approval of the President, prescribe the conditions under which gold may be acquired and held, transported, melted or treated, imported, exported, or earmarked: (a) for industrial, professional, and artistic use; (b) by the Federal Reserve banks for the purpose of settling international balances; and, (c) for such other purposes as in his judgment are not inconsistent with the purposes of this Act. Gold in any form may be acquired, transported, melted or treated, imported, exported, or earmarked or held in custody for foreign or domestic account (except on behalf of the United States) only to the extent permitted by, and subject to the conditions prescribed in, or pursuant to, such regula-

tions. Such regulations may exempt from the provisions of this section, in whole or in part, gold situated in places beyond the limits of the continental United States.

2. R.S. 3699, as amended by § 9 of the Gold Reserve Act of 1934 (48 Stat. 341), 31 U.S.C. 733, provides in part:

> The Secretary of the Treasury * * * may sell gold in any amounts, at home or abroad, in such manner and at such rates and upon such terms and conditions as he may deem most advantageous to the public interest * * *: *Provided, however,* That the Secretary of the Treasury may sell the gold which is required to be maintained as a reserve or as security for currency issued by the United States, only to the extent necessary to maintain such currency at a parity with the gold dollar.

3. R.S. 3700, as amended by § 8 of the Gold Reserve Act of 1934 (48 Stat. 341), 31 U.S.C. 734, provides in part:

> With the approval of the President, the Secretary of the Treasury may purchase gold in any amounts, at home or abroad, with any direct obligations, coin, or currency of the United States, authorized by law, or with any funds in the Treasury not otherwise appropriated, at such rates and upon such terms and conditions as he may deem most advantageous to the public interest * * *.

STATEMENT

Petitioner initiated this action for declaratory relief to challenge the authority of the Secretary of the

Treasury under Section 3 of the Gold Reserve Act and to enjoin the respondent, a Treasury Agent for the State of Oregon, from enforcing the Treasury regulations controlling the acquisition and processing of gold. She alleges that she owns a 55% interest in certain mining claims in which approximately 234,000 tons of gold ore are blocked out but cannot be profitably mined or processed at the current price paid for gold by the Treasury. As a result of the price maintained by the Treasury, she claims that her property has been "taken" because it is idle and the mining improvements are deteriorating (Pet. 5–7).

The district court dismissed the petitioner's suit with prejudice for failing to state a cause of action. The court of appeals affirmed, holding that the Treasury regulations were authorized by Section 3 of the Gold Reserve Act (Pet. 32) and that the Act itself was a valid exercise of Congressional power over the monetary system (Pet. 36). It further concluded that the regulations did not amount to an unconstitutional "taking" of the petitioner's property under the Fifth Amendment because they had only an indirect or consequential effect on her ability to mine and dispose of gold (Pet. 37).[1]

ARGUMENT

Petitioner has unsuccessfully sought review of her grievances from this Court on two previous occasions,

[1] The court of appeals also held that the Secretary of the Treasury was not an indispensable party to the action. The Government disagrees with that conclusion (see *Blackmar* v. *Guerre*, 342 U.S. 512; *Webster* v. *Fall*, 266 U.S. 507; *Gnerich* v. *Rutter*, 265 U.S. 388; *Warner Valley Stock Co.* v. *Smith*, 165 U.S. 28), and, if certiorari were granted, would contend that the lower courts were without jurisdiction.

advancing substantially the same arguments which she presents in the present petition. In *Laycock* v. *United States,* 230 F. 2d 848, certiorari denied, 351 U.S. 964, she sought damages for loss of profits and depreciation of property allegedly caused by the Gold Reserve Act and the regulations. That suit was dismissed for lack of jurisdiction because the Government's consent to be sued for damages arising out of the control of gold had been expressly withdrawn by an Act of Congress, 49 Stat. 938, 939, 31 U.S.C. 773b. Petitioner then instituted the present action and moved the trial court to convene a three-judge district court. That motion was denied on the ground that there was no substantial question as to the constitutionality of the Gold Reserve Act, and this Court denied a petition for mandamus. *Laycock* v. *Mathes,* 354 U.S. 919.

Petitioner's arguments, presented to this Court for the third time, may be grouped into three main contentions: (1) that the Gold Reserve Act of 1934 is unconstitutional; (2) that the regulations of the Secretary of the Treasury are not authorized by the statute; and (3) that the regulations effect a "taking" of petitioner's property because they prevent her from mining and selling gold at a profit. Each contention is without substance.

1. That Congress has power to control the acquisition and possession of gold has long been settled. *Nortz* v. *United States,* 294 U.S. 317; *Norman* v. *B. & O. R. Co.,* 294 U.S. 240; *Ling Su Fan* v. *United States,* 218 U.S. 302. The need to control gold in order to regulate the value of currency depends upon an appraisal of economic theories and facts that are

within the exclusive province of Congress, and this Court has consistently refused to substitute its judgment on that policy determination. *E.g., Norman* v. *B. & O. R. Co., supra,* at 311. Congress considered the regulation of gold "in any form" (31 U.S.C. 442) necessary to a stable and uniform monetary system, and that policy judgment forecloses the distinction between gold as a monetary metal and "gold as a commodity" that petitioner seeks to draw (Pet. 13). Cf. *British-American Tobacco Co.* v. *Federal Reserve Bank,* 104 F. 2d 652 (C.A. 2); *Emery Bird Thayer Dry Goods Co.* v. *Williams,* 107 F. 2d 965, 971 (C.A. 8).

2. The Treasury Regulations challenged by petitioner (31 C.F.R. 54.1–54.70) establish a comprehensive scheme for control of gold by the Government. Among other things, they provide a strict licensing system for those who deal in gold (31 C.F.R. 54.12) and prescribe a standard price of $35 per troy ounce at which the Treasury will purchase or sell gold (31 C.F.R. 54.44, 54.52). Such regulations are unquestionably indispensable to implementation of the statute. Further, as the court of appeals pointed out, they represent a contemporaneous construction of the Act, are fully consistent with its legislative history, and have withstood repeated attempts at amendment (Pet. 27–31).

3. In claiming that the regulations effect a "taking" of her property, petitioner contends, in effect, that the Government, through its patent grant to mine gold, has undertaken an obligation to take no action that would affect her ability to operate the mine profit-

ably (Pet. 6, 9, 12). Clearly, however, the mining patent gave her only certain property rights in the minerals and did not immunize her from general regulation of the industry. Nor has there been a taking of the rights conferred by the patent. Property is "taken" only if there is either actual physical invasion or direct and substantial interference with the use and enjoyment of property,[2] and neither has occurred here.[3] Petitioner's injury, if any, is merely a remote consequence of federal legislation of nation-wide application, an interference of a kind and degree that has never been considered a "taking". See *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 168, in which the Court, holding that wartime restrictions suspending gold mining did not effect a "taking", reaffirmed the principle that "the mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily enough to establish the owner's right to compensation." See also *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 281–283; *Omnia Commercial Co.* v. *United States*, 261 U.S. 502, 510, 513; *Mugler* v. *Kansas*, 123 U.S. 623, 664, 668, 669.

---

[2] See *United States* v. *Pewee Coal Co.*, 341 U.S. 114; *United States* v. *Dickinson*, 331 U.S. 745, 748; *United States* v. *General Motors Corp.*, 323 U.S. 373, 378; *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413; *Block* v. *Hirsh*, 256 U.S. 135, 155–156.

[3] Cases such as *United States* v. *Kansas City Life Ins. Co.*, 339 U.S. 799, and *United States* v. *Causby*, 328 U.S. 256, relied on by petitioner (Pet. 9–10), involved actual physical invasion of property. *Pennsylvania Coal Co.* v. *Mahon*, *supra*, is distinguishable in that the restriction imposed there was for the particular benefit of a single house, while the restriction here is one of general application for the public good.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

SAMUEL D. SLADE,
RONALD A. JACKS,
Attorneys.

DECEMBER 1959.

U.S. GOVERNMENT PRINTING OFFICE: 1959